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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD ROY WELCH,

Defendant and Appellant.

F076991

(Super. Ct. No. 16M0118)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Kings County. Michael J. Reinhart, Judge.

Conness A. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Peña, J. and Smith, J.

Defendant Edward Roy Welch contends on appeal the trial court erroneously denied his motion for a *Marsden*¹ hearing for substitution of appointed counsel because he requested the hearing during the pendency of competency proceedings. The People concede and we agree. We conditionally reverse and remand for a *Marsden* hearing.

BACKGROUND

On September 20, 2016, the Kings County District Attorney charged defendant with possession of methamphetamine in prison (Pen. Code, § 4573.6;² count 1) and possession of drugs in prison (§ 4573.8; count 2). Defendant pled not guilty to the charges.

On December 1, 2016, the trial court declared a doubt as to defendant's competency within the meaning of section 1368, suspended criminal proceedings, and ordered a psychiatric competency evaluation.

On May 18, 2017, the trial court had received the psychiatrist's report finding defendant incompetent to stand trial. Defendant appeared and his counsel stated that he was requesting to "go pro per." The trial court answered, "Well, that request is going to be denied. [¶] The report from Dr. Terrell filed in this matter, and the reason why I reviewed it this morning is for receipt of that report, and that report indicates that he is mentally incompetent to stand trial." Defense counsel stated that defendant wished to contest the finding. The matter was continued to the next day.

On May 19, 2017, the trial court recapped: "Doctor[']s report indicates he is incompetent to stand trial. The defendant made a request to represent himself, I denied that based upon the doctor[']s report that he is incompetent. The issue that I need to get from the parties right now is whether they wish to submit it on the doctor's report, or set

¹ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

² All statutory references are to the Penal Code unless otherwise noted.

this for a contested trial.” Counsel requested a second psychiatric evaluation. The following occurred:

“THE COURT: We’re going to appoint Dr. Brandi Mathews to evaluate the defendant, and it will be the same as it will be for Dr. Terrell. The People prepared the report.

“THE DEFENDANT: *I would like to request new counsel to represent me in this issue.*

“THE COURT: All right, and the People need an order.

“[DEFENSE COUNSEL]: Your Honor, I don’t know this doctor, are we going to do like we do Dr. Terrell, bring him here and have him evaluated here? It is probably easier.

“THE COURT: I think it is going to be necessary, so we need to arrange those dates.

“THE DEFENDANT: Reinhart, *I am requesting new counsel.*

“THE COURT: It is Judge Reinhard and—

“THE DEFENDANT: You ain’t acting like a judge. You’re acting like abuse of discretion, that is what you’re acting like.

“THE COURT: Sir, if you keep on interrupting and being disrespectful—

“THE DEFENDANT: You could take me out of here right now, we’ll deal with this in the trial and the appeal on it.

“THE COURT: All right, the defendant is removed.” (Italics added.)

The court set a date for the next hearing. Then the following occurred:

“THE COURT: ... I am not undertaking a Marsden motion at this time. He is incompetent, and he has displayed some abhorrent behavior repeatedly in court. Criminal proceedings were suspended, and there is— unless you have grounds.

“[DEFENSE COUNSEL]: I don’t think the Court can, because, yeah. And I don’t think it is necessary at this point. I think that once we complete this process it will be a little bit easier with him.

“THE COURT: Like I say, we need to get him in a therapeutic environment.”

On October 16, 2017, the trial court had received the second psychiatrist’s report, which also found defendant incompetent to stand trial. The matter was set for trial on the issue of competency.

On December 8, 2017, defense counsel stated she was waiving defendant’s right to a jury trial. The following occurred:

“THE DEFENDANT: I’m in disagreement with that, I’m not waiving that.

“[DEFENSE COUNSEL]: I’m exercising my right as his counsel to do so.

“THE COURT: You’re setting this matter for a court trial?

“[DEFENSE COUNSEL]: Yes, your Honor.

“THE COURT: All right [¶] ... [¶]

“THE DEFENDANT: I don’t have a right to a jury trial on this case in this situation?

“[DEFENSE COUNSEL]: You do, but I’m waiving that right for you.

“THE DEFENDANT: I’m in disagreement with that. That’s ineffective right now. Counsel, I’m not—I’m not in agreement with that, your Honor.

“THE COURT: All right, I understand that, sir.

“THE DEFENDANT: I’m not waiving my right.

“THE COURT: The matter will be a court trial, vacate the jury portion of that, it’s a court trial.”

On December 11, 2017, the trial took place. The question of whether defendant would testify was raised and the following occurred:

“[DEFENSE COUNSEL]: ... [Defendant], would you like to take the stand in your own defense?

“THE DEFENDANT: In a jury trial I would have loved to, yeah.

“[DEFENSE COUNSEL]: But we’re not in a jury trial.

“THE DEFENDANT: I am in biased court.

“[DEFENSE COUNSEL]: So would you like to take the stand, yes or no?

“THE DEFENDANT: Not if it is a bias court, no.

“[DEFENSE COUNSEL]: All right, so he is choosing not to.

“THE COURT: Well, he doesn’t have to make that choice as of yet. [¶] [Defendant], let me be clear. You’re not in a biased court.

“THE DEFENDANT: You guys are both out to find me incompetent. How is it not when I have—

“THE COURT: Please listen, all right. You have a right to testify at this hearing, nobody can make you testify. Do you understand that right? And is there a reason why you’re not answering? [¶] ... [¶]

“THE DEFENDANT: I didn’t waive my right to testify in a jury trial.

“THE COURT: Sir, is there a reason why you’re not responding to my question?

“THE DEFENDANT: Because I got deprived of my right to a jury trial, which she doesn’t have the right to do.

“THE COURT: Well, I am not sure why you’re refusing to answer that question, but we’ll proceed.

“THE DEFENDANT: I made my statement, that is all you’re going to get from me.”

The trial proceeded and, ultimately, defendant testified. The court found defendant incompetent.

On January 24, 2018, the trial court ordered defendant committed to the State Department of State Hospitals.

On January 31, 2018, defendant filed a notice of appeal.

DISCUSSION

“When a defendant seeks new counsel on the basis that his appointed counsel is providing inadequate representation—i.e., makes what is commonly called a *Marsden* motion [citation]—the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.” (*People v. Smith* (2003) 30 Cal.4th 581, 604.)

A defendant is entitled to request substitution of counsel under *Marsden* even when criminal proceedings have been suspended to evaluate the defendant’s competence. (*People v. Taylor* (2010) 48 Cal.4th 574, 600–601; *People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1069; *People v. Govea* (2009) 175 Cal.App.4th 57, 61).)³

Where a defendant provides the trial court with “ ‘some clear indication’ ” of his desire for substitute counsel, the court must hold a *Marsden* hearing to allow the defendant to explain the basis for the request. (*People v. Sanchez* (2011) 53 Cal.4th 80, 89–90.) Although the decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney is within the discretion of the trial court, the court “cannot thoughtfully exercise its discretion ... without listening to [the defendant’s] reasons for requesting a change of attorneys. A trial judge is unable to intelligently deal with a defendant’s request for substitution of attorneys unless he [or she] is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom.

³ This is not the case, however, for a defendant’s motion to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1108.)

Indeed, ‘[w]hen inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside the trial record: whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choice of trial tactics and strategy.’ [Citation.] Thus, a judge who denies a motion for substitution of attorneys solely on the basis of his [or her] courtroom observations, despite a defendant’s offer to relate specific instances of misconduct, abuses the exercise of his [or her] discretion to determine the competency of the attorney. A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention ‘is lacking in all the attributes of a judicial determination.’ ” (*Marsden, supra*, 2 Cal.3d at pp. 123–124.) The defendant must “be given ample opportunity to explain and if possible to document the basis of his contention.... [beyond the] bare complaint” that counsel did not provide adequate assistance. (*Marsden*, at p. 125.)

A trial court’s erroneous failure to conduct a *Marsden* hearing is reviewed to determine whether the error was harmless beyond a reasonable doubt. (*Marsden, supra*, 2 Cal.3d at p. 126, citing *Chapman v. California* (1967) 386 U.S. 18.)

Here, defendant clearly stated twice that he wanted a new attorney. Having reviewed the entire record, we cannot say the trial court’s error in refusing to grant a *Marsden* hearing was harmless. Defendant must be granted a *Marsden* hearing.

DISPOSITION

The trial court’s orders finding defendant incompetent to stand trial and committing him to the State Department of State Hospitals are conditionally reversed. The matter is remanded for the trial court to hold a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. If the court declines to appoint new counsel, the court shall reinstate its orders.